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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

HARRY T. GRAHAM, INDIVIDUALLY AND AS Former Collector of Internal Revenue, et al., petitioners, v. ALFRED I. DU PONT, RESPONDENT.	}	No. 846.
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CERTIORARI TO THE UNITED STATE CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

STATEMENT OF THE CASE.

This case is before this court on writ of certiorari issued February 26, 1923, to review the *per curiam* decree of the United States Circuit Court of Appeals for the Third Circuit, entered January 3, 1923 (Record, p. 113), which affirmed a decree of the District Court of the United States for the District of Delaware (Record, p. 102). This decree granted a preliminary injunction to restrain the collection by process of distraint of a tax, amounting to \$1,576,015.86, on income in the form of capital stock, which stock was held by this court to be taxable income in the case of *United States v. Phellis*, 257 U. S. 156.

I.

The Statutes.

The statute barring this suit is R. S. Section 3224, which reads as follows:

No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

The applicable parts of the Revenue Act of 1921 (42 Stat. 227), as amended by the Act approved March 4, 1923 (Public No. 527), read as follows:

SEC. 250 * * * (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts,

or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *

SEC. 252. (a) That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits, or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits, or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer, *or unless before the expiration of two years from the time the tax was paid a claim therefor is filed by the taxpayer*: * * *

(Italics show new matter added by amendment of March 4, 1923.)

SEC. 1318. That section 3226 of the Revised Statutes is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, *unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within ninety days after any such disallowance notify the taxpayer thereof by mail.*"

(Italics show new matter added by amendment of March 4, 1923.)

II.

The Facts.

The respondent was one of the stockholders of the E. I. du Pont de Nemours Powder Company of New Jersey at the time of the reorganization of said company and the incorporation of E. I. du Pont de Nemours & Company of Delaware, and as such he received as a dividend on or about October 1, 1915, from the New Jersey Company 75,534 shares of the common stock of the Delaware Company.

The Commissioner of Internal Revenue held the stock so distributed by the New Jersey Company to be taxable income for the year 1915 to the distributees thereof under the Income Tax Act of October 3, 1913 (c. 16, 38 Stat. 114, 167), and determined the fair market value of each share of said stock at the time of distribution on October 1, 1915, to be \$347.50. This valuation was sustained by the Court of Claims of the United States in the case of *Phellis v. United States*, 56 Ct. Cls. 157. (Record, p. 92.) On appeal, the shares of stock so distributed were held by this court to be taxable income for the year 1915 in the case of *United States v. Phellis*, 257 U. S. 156. (Record, p. 94.)

Phellis, like du Pont (the present appellee), was a stockholder of the New Jersey company, and the dividend, which in his case this Court held to be subject to the tax, is the same dividend as to which du Pont is attempting in this suit to enjoin the collection of the tax imposed thereon. Moreover,

the same able and distinguished counsel, who now represents du Pont, argued in behalf of Phellis both in the Court of Claims and in this Court, and his contention as to the invalidity of the tax was then considered and rejected.

Taxpayers have on other occasions tried to enjoin the collection of taxes; but this case is peculiar and extraordinary in the fact that the present plaintiff is seeking to enjoin the collection of a tax, notwithstanding that he can no longer dispute his liability for the tax in some amount. The only possible defense, which may be still open to him after he has paid the tax under protest, is that as the income was in the form of a distribution of stock, such stock may have been overvalued; but if, under R. S. 3224, a Court of equity may not enjoin the collection of the tax, even where a plausible contention is suggested that the tax itself is wholly void as unconstitutional, *a fortiori* a Court should not violate the plain letter of the statute, embodying an important public policy, by enjoining the collection of a tax as to . which liability in some amount can no longer be successfully disputed, and the only question is as to the amount thereof.

The plaintiff had received on October 1, 1915, the dividend in question. On February 19, 1916, he filed an income-tax return and on March 4, 1916, a substitute return (both for the year 1915); but he did not include as income the value of the dividend thus received.

On December 31, 1919, the Collector of Internal Revenue demanded of him that he pay the tax which is the subject matter of the present suit, and on January 24, 1920, the demand was renewed and plaintiff was informed that "unless he paid the same, collection would be made thereof by the Collector for the District of Delaware through distraint." Thereupon plaintiff filed a claim in abatement of said tax with the Commissioner of Internal Revenue, and this claim was duly overruled on February 3, 1922. The plaintiff, instead of paying the tax under protest and suing for its recovery, thereupon brought this suit to restrain the Collector of Internal Revenue from distraining, and the Court below, in plain violation of the Act of Congress (R. S. 3224), granted the injunction. Hence this appeal.

The delay in the demand for the additional tax from 1916 until December 31, 1919, was due to the fact, as appears from the affidavit of the Collector of Internal Revenue (Transcript, p. 33), that the Treasury Department did not know of the receipt by the said Du Pont of the taxable income in question until November 30, 1917, when, after an investigation of his tax liability for the years 1913, 1914, and 1915, it developed that the plaintiff

had received as income during the year 1915 two hundred per cent common stock dividends issued by the E. I. du Pont de Nemours Company, previously omitted.

A further investigation was thereupon ordered, and, upon reports of the investigators, dated April 19, 1918, and July 30, 1919, the Treasury Department reached the conclusion that the said Du Pont, after certain adjustments, was, by reason of the said dividends, further indebted to the Government in the sum of \$1,576,015.86, being the tax which is the subject of this suit.

Thereupon, as previously stated, the Collector of Internal Revenue, on December 31, 1919, made formal demand upon Du Pont to pay the additional tax. Thereupon, as previously stated, Du Pont and other stockholders filed a claim in abatement and requested hearings, both as to the validity and the amount of the several taxes. A final decision on these hearings was postponed until this Court could determine the underlying question as to whether the dividend was taxable income—that fact being still challenged by the stockholders—and as soon as this Court, on November 21, 1921, held, in the Phellis Case, that the stock distribution in question was taxable income, the Treasury Department, as previously stated, on February 3, 1922, rejected the claim in abatement and thereby again demanded the payment of the tax. Thereupon the plaintiff, instead of paying the tax under protest and suing for its recovery, brought this suit.

The matter came on for hearing March 3, 1922, on the respondent's motion for a preliminary injunction and on the petitioners' motion to dismiss the bill. On

June 13, 1922, the District Court filed an opinion holding that petitioners' motion to dismiss should be denied and that respondent's motion for a preliminary injunction should be granted (Record, p. 102); and on June 27, 1922, an order of the court was filed overruling petitioners' motion to dismiss the bill and granting a preliminary injunction to restrain the collection by distraint of the tax in question.

An appeal was taken on July 25, 1922, to the United States Circuit Court of Appeals for the Third Circuit, under Section 129 of the Judicial Code of the United States. The Circuit Court of Appeals on January 3, 1923, by a *per curiam* opinion affirmed the decree of the District Court. (Record, p. 112.)

III.

The Question.

CAN THIS SUIT, HAVING FOR ITS PURPOSE THE RESTRAINING OF THE COLLECTION OF A FEDERAL TAX, BE MAINTAINED?

IV.

Assignments of Error.

I. The Court erred in overruling the defendant's motion to dismiss the bill.

II. The Court erred in granting the plaintiff's motion for a preliminary injunction.

III. The Court erred in holding that the plaintiff had no adequate remedy at law.

IV. The Court erred in holding that if the plaintiff had paid the tax in response to the assessment and demand his right to recover back the same, if illegally or erroneously assessed and collected, would be barred by sections 250 (d) and 252 of the revenue act approved November 23, 1921.

Argument.

V.

THE SUIT IN THIS CASE HAS FOR ITS PURPOSE THE RESTRAINING OF THE COLLECTION OF A FEDERAL TAX, AND IT CAN NOT BE MAINTAINED.

That this is a suit for the purpose of restraining the collection of a Federal tax no one can deny.

The only relief prayed for in the bill was injunction to restrain the collection of the tax. (Record, p. 11.) It is true that there was a general prayer for relief, but any relief given under a general prayer must be agreeable to the case made by the bill. *Allen v. Pullman's Palace Car Co.*, 139 U. S. 638, 662. In this instance respondent sought a preventive remedy only.

The averments of the bill, showing as they did that the sole purpose of the suit was to restrain the collection of a Federal tax, were sufficient in themselves to have sounded the death knell of the complaint. A suit for such a purpose is directly forbidden by Section 3224 of the Revised Statutes.

The inhibition of Section 3224 of the Revised Statutes was pleaded in the District Court, but that court was of the opinion that if respondent paid the tax in response to the assessment and demand his remedy at law to test the validity of the assessment and collection would have been barred by certain provisions of Sections 250 (d) and 252 of the Revenue Act of 1921, which will be explained later, and that in such a case the provisions of Section 3224 are inapplicable.

The basis of the decree of the District Court, as shown by the opinion of the learned District Judge (Record, p. 102), which opinion was adopted by the Circuit Court of Appeals (Record, p. 112), was that Section 3224 applies only in cases where there is a plain, adequate, and complete remedy at law, and not to cases where the remedy at law is doubtful. Such a view gives no effect whatever to the inhibition of Section 3224 of the Revised Statutes, but considers the question as one of general equity jurisdiction unaffected by Section 3224 of the Revised Statutes, which section is nothing if not a denial of the jurisdiction of courts of equity to interfere with the collection of the revenues of the United States.

If Section 3224 had never been enacted, it is possible that the collection of a Federal tax might be restrained in cases where the remedy at law is doubtful, although from an examination of the cases arising prior to its enactment, it appears that the United States courts were unanimous in holding that the collection of a Federal tax could not be restrained by

injunction, regardless of the absence of any express legislative enactment inhibiting such relief. *Roback v. Taylor*, 4 Int. Rev. Rec. 170; *McGee v. Denton*, 5 Blatchf. 130, Fed. Cas. 8943; *United States v. Pacific R. R.*, 4 Dill. 66, Fed. Cas. 15983.

Since the enactment of Section 3224 of the Revised Statutes (originally Sec. 10, Act of March 2, 1867, c. 169, 14 Stat. 475), the District and Circuit Courts of the United States have had occasion to construe and apply it in many cases. The cases are so numerous that their mere citation would unnecessarily encumber this brief.

It may be said, however, without fear of successful contradiction, that there can not be found in the Federal reports to-day a single decision standing unreversed or unmodified where injunction has been granted to restrain the collection of a Federal tax.

On the other hand, the cases are practically unanimous in holding that *the inhibition of Section 3224 applies to all assessments of taxes made under color of their offices by internal revenue officers charged with general jurisdiction of the subject of assessing taxes.*

"Such," said Mr. Justice Blatchford, speaking the opinion of this court in *Snyder v. Marks*, 109 U. S. 189, 193, "has been the current of the decisions in the Circuit Courts of the United States, and we are satisfied it is the correct view of the law." The leading cases in the Circuit Courts up to the date of the decision in the case of *Snyder v. Marks* are cited in the opinion of Mr. Justice Blatchford in the latter case.

Since the decision in *Snyder v. Marks* this court has had occasion to construe and apply Section 3224 a number of times, but on no occasion has it departed from the sound construction adopted in that case.

Pacific Whaling Co. v. United States, 187 U. S. 447.

Corbus v. Alaska Gold Mining Co., 187 U. S. 455.

Dodge v. Osborn, 240 U. S. 118.

Dodge v. Brady, 240 U. S. 122.

Bailey, Collector, v. George et al., 259 U. S. 16.

This Court will not confuse the case at bar with the recent cases of *Lipke v. Lederer*, 42 Sup. Ct. 549, and *Regal Drug Corporation v. Wardell*, 43 Sup. Ct. 152, in which the collection of *penalties* under Section 35 of the National Prohibition Act was restrained, or with *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, and *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, which latter cases were suits by stockholders against the corporation in which they held stock, *to restrain the corporation from paying voluntarily* certain income taxes assessed under acts of Congress alleged to have been unconstitutional. In none of said cases was the suit against a collector of internal revenue to restrain the collection of a tax.

Nor does the decision in *Hill v. Wallace*, 257 U. S. 310, support this suit, because this Court sustained that case as a stockholders' suit against a corporation to restrain the payment of so-called "taxes," adjudged to be beyond the taxing power under the Constitution, and therefore within the rule laid down

in the *Pollock* and *Brushaber* cases. The Supreme Court held that the statute laying the taxes in the case of *Hill v. Wallace* was not a taxing act, but an act to regulate grain exchanges. The exaction was not, therefore, strictly speaking, a "tax," nor had there been any assessment by the Commissioner of Internal Revenue or attempt by the collector of internal revenue to collect an assessment. The effect of the decision was not, therefore, to restrain the collection of a tax.

In the case at bar the assessment is a concededly lawful tax, already sustained as a tax by this Court, and the suit was against the collector to restrain its collection.

The effect of Section 3224 of the Revised Statutes, as construed and applied by this Court, may be summed up as follows: *If the assessment is of a tax for revenue purposes, made and attempted to be enforced by the proper revenue officers of the United States under color of their offices, its collection can not be restrained by injunction.*

Cheatham v. United States, 92 U. S. 85.

State R. R. Tax Cases, 92 U. S. 575.

Snyder v. Marks, 109 U. S. 189.

Pacific Whaling Company v. United States, 187 U. S. 447.

Corbus v. Alaska Gold Mining Company, 187 U. S. 455.

Dodge v. Osborn, 240 U. S. 118.

Dodge v. Brady, 240 U. S. 122.

Bailey, Collector, v. George, et al., 259 U. S. 16.

VI.

Respondent's remedy at law was plain, adequate, and complete, and was not, and is not, barred by any provision of the Revenue Act of 1921, or any other Statute.

There is no equity in the respondent's case, even though his bill of complaint averred no less than five alleged grounds for equitable relief. It requires only a glance at the record to show that if the collection of the tax was barred by the statute of limitations contained in Section 250 (d) of the Revenue Act of 1921, it was not due to any laches on the part of the Government, but to delays created by counsel for the respondent in seeking hearings and abatement of the tax. (Record, pp. 34-39.) Respondent was given every possible opportunity by the Commissioner to show cause why the assessment should not be made. The assessment was withheld a matter of two years in order that he might present facts and arguments against it, and in order that all questions as to the legality of the tax might be determined. (Record, pp. 34-39.)

After the assessment was made no action was taken looking to its collection pending the decision of this Court in the case of *United States v. Phellis*, 257 U. S. 156, and even after that decision, sustaining the legality of the tax, the Commissioner gave the respondent ample opportunity to pay without resorting to stringent measures, not judicial, to enforce payment. (Record, p. 38-39.)

The bill of complaint alleged the following grounds for relief:

(1) That the assessment was illegal and invalid in that it was not made within three years after the due date of the return;

(2) That the amount of the assessment was larger than it should have been;

(3) That the assessment constituted a cloud upon respondent's title to his lands;

(4) That the enforcement of the assessment and demand would result in great hardship to respondent; and

(5) That respondent was without adequate remedy at law.

The court below rejected the application for relief by injunction on every ground assigned except the fifth, i. e., that respondent was without adequate remedy at law, holding in accordance with the decisions of this Court that the alleged illegality or inaccuracy of a tax assessment is insufficient ground for restraining its collection. Speaking of the allegations of the bill that the assessment was illegal and incorrect, the learned District Judge said:

These considerations, however, all go to the question of the invalidity of the return and assessment, and can not be raised in this proceeding, in view of the inhibition of Section 3224, R. S. (Comp. St. Sec. 5947), providing, "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," and the rulings of the Supreme Court holding that Congress "has

provided a complete system of corrective justice in regard to all taxes imposed by the General Government, including provisions for recovering the tax after it has been paid, by suit against the collector, and therefore the taxpayer has no recourse to the courts until after the money is paid." *State Railroad Tax Cases*, 92 U. S. 575, 613; 23 L. Ed. 663.

Therefore it must be held that the remedy by injunction will not lie, unless, because the plaintiff through the threatened action of the collector to collect through distraint is deprived of any redress at law, the effect of section 3224 upon the facts of this case has been modified by subsequent legislation.

283 Fed. 300, 303. (Record, p. 105.)

The District Court was clearly right in denying plaintiff's prayer for relief on grounds one to four, cited above, because—

(1) Under authority of *Eliot National Bank v. Gill* (C. C. A., 1st Cir.), 210 Fed. 933, 939, and *Penrose v. Skinner*, 278 Fed. 284, 286, the assessment was legal; and under the decisions of this Court in *Snyder v. Marks*, 109 U. S. 189, and other cases hereinbefore cited, the collection of the tax could not be restrained by injunction even if the assessment was illegal.

(2) The amount of the assessment was correct under the decision of the Court of Claims in the case of *Phellis v. United States*, 56 Ct. Cls. 156, and under the decisions of this Court in *Snyder v. Marks*, *supra*, and other cases hereinbefore cited, the collection of

the taxes could not be restrained by injunction even if the assessment was incorrect.

(3) Under Section 3224 of the Revised Statutes cloud upon title is insufficient ground for restraining the collection of a tax. *Dodge v. Osborn*, 240 U. S. 118.

(4) That the exaction of the tax might result in hardship to the taxpayer is not a valid ground for relief by injunction. *Calkins v. Smietanka*, 240 Fed. 138; *Markle v. Kirkendall*, 267 Fed. 498.

The reason assigned by the District Court for granting the preliminary injunction was that the tax was more than five years over due, and had respondent paid it he would have had no remedy at law because of (1) the first proviso of Section 252 of the Revenue Act of 1921 "That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer" and (2) the provision of Section 250 (d) of the Revenue Act of 1921 that "no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under Section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed," etc. (Record. pp. 105-106), or, stated plainly, because plaintiff had managed to escape payment for five years, he was excused by a court of equity from paying at all.

The underlying theory of the decision in the court below is summed up in one sentence of the opinion, "It would be contrary to equity to hold that, where no remedy is available at law, equity will fail to afford relief." (Record, p. 107.) Such a view gives no effect whatever to Section 3224 of the Revised Statutes, but attempts to decide the case on general principles of equity. Even if we were compelled to accept such a view as correct, which we do not, we would nevertheless disagree with the conclusion that there was no remedy at law in the case at bar.

VII.

Section 252 of the Revenue Act of 1921 Did not bar Respondent from his remedy at law, and even if it did, the bar has been removed by the Amendment of March 4, 1923. (Public, No. 527.)

It is interesting to note that the court did not say the respondent did not at the time of filing his bill in equity have a plain, adequate, and complete remedy at law. The idea that the court expressed, was that *if the respondent paid the tax* he would then have had no plain, adequate, and complete remedy at law, but the *respondent had not paid the tax when he filed his bill for injunction, and he has never paid the tax*. Consequently, the question of remedy at law or no remedy at law has never fairly arisen.

It is quite true that a taxpayer has no remedy at law or in equity to test the accuracy or validity of a tax assessment *before he pays the tax*. The remedy

is at law and only after payment of the tax. If, after the payment of the tax, his remedy at law is denied him, it is time enough then to appeal to a court of equity. It is the plain intendment of Section 3224 of the Revised Statutes, as construed by this Court, that he can not have any appeal to any court, whether of law or of equity, *until after the payment of the tax.*

Bailey, Collector, v. George et al., 259 U. S. 16.

Dodge v. Osborn, 240 U. S. 118.

Pacific Whaling Co. v. United States, 187 U. S. 447.

Corbus v. Alaska Gold Mining Co., 187 U. S. 455.

Snyder v. Marks, 109 U. S. 189.

State R. R. Tax Cases, 92 U. S. 575.

Cheatham v. United States, 92 U. S. 85.

As stated by this Court in *Corbus v. Alaska Gold Mining Company*, 187 U. S. 455, 464:

Not only is it the general rule that equity will not restrain the collection of a tax on the mere ground of its illegality, but also, as appears by its legislation, Congress has attempted to enforce that rule and to require payment of the tax by the party charged therewith before inquiry as to its validity will be permitted. See *Pacific Steam Whaling Company v. United States*, ante, p. 447.

And as stated by Chief Justice Taft in the case of *Bailey, Coll'r, v. George et al.*, 259 U. S. 16;

The bill does aver "That these your petitioners have exhausted all legal remedies and

it is necessary for them to be given equitable relief in the premises": But there are no specific facts set forth sustaining this mere legal conclusion. * * * In spite of their averment, the complainants did not exhaust all their legal remedies. *They might have paid the amount under protest and then brought suit against the Collector to recover the amount paid with interest.* No fact is alleged which would prevent them from availing themselves of this form of remedy. (Italics ours.)

That the court below erred in assuming that "where no remedy is available at law equity will not fail to afford relief," is apparent from the decision of this court in *Pacific Whaling Company v. United States*, 187 U. S. 447, 452, in which Mr. Justice Brewer, speaking the opinion of the court, said:

It is said that unless this application can be sustained the petitioner is without remedy, and that there is no wrong without a remedy. While as a general statement this may be true, it does not follow that it is without exceptions, and especially does *it not follow that such remedy must always be obtainable in the courts.* Indeed, as the government can not be sued without its consent, it may happen that the only remedy a party has for a wrong done by one of its officers is an application to the sense of justice of the legislative department. * * * (Italics ours).

The difference between the decision of the court below in the case at bar and the decision of this Court in *Pacific Whaling Company v. United States*,

supra, is that this court gave effect to the provisions of Section 3224 of the Revised Statutes and the court below did not.

Furthermore, it is quite evident that the court below was considering, not whether the taxpayer had a remedy at law *but whether he could successfully pursue his remedy*. While we insist that he had a remedy, we admit that it would be of little value to him for the very palpable reason that his liability to pay a tax on his dividend has already been decided by this Court in the case of *United States v. Phellis*, 257 U. S. 156.

The court below held that the first proviso of Section 252 constituted a bar to respondent's remedy at law because more than five years had elapsed since the due date of the income-tax return, and the tax was still unpaid; therefore, if respondent had paid the tax after such five years, he could not have claimed a refund because, under the first proviso of section 252, the Commissioner of Internal Revenue was not authorized to allow a credit or refund after such five years.

The construction of the court below was contrary to the contemporaneous construction of the Department at the time the bill was filed, which was later published in T. D. 3416, approved December 16, 1922, as follows:

A claim for credit or refund of an amount of income, war-profits, or excess-profits tax, erroneously or illegally collected, may be allowed after five years from the date when

the return was due, even though such claim is not filed by the taxpayer until after the expiration of the five years, if such claim is presented to the Commissioner of Internal Revenue within four years next after the payment of the tax.

But the previous construction is immaterial now, because by amendment of March 4, 1923 (Public No. 527), Congress has authorized the Commissioner to allow a refund or credit in any case where the claim is filed *within two years after the payment of the tax, even if the payment is more than five years after the due date of the return.* This amendment renders academic the question whether Section 252 of the Revenue Act of 1921 deprived the respondent of his remedy at law.

VIII.

Section 250 (d) of the Revenue Act of 1921 does not bar the collection by distraint after, if the assessment is made before, the expiration of five years after the date when the return was filed.

Section 1320 of the Revenue Act of 1921, cited in the opinion of the court below (Record, p. 105), does not apply to income taxes, and as the tax in the case at bar was an income tax, the court's application of Section 1320 will be ignored. Section 250 (d) (also cited in the opinion) does apply to income taxes and prescribes limitations upon the time within which such taxes can be determined and assessed, as well as upon the time within which suits can

be begun for their collection. It does not, however, prescribe a limitation upon the time within which a tax can be collected by distraint after an assessment is made within the prescribed period. Section 250 (d) provides in part as follows:

Sec. 250 * * * (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *

It will be noted that the foregoing section prescribes a limitation upon the time within which such taxes must be "determined and assessed," such limitation being four years for taxes due under the 1921 Act and five years for taxes due under prior income tax acts. It also prescribes a limitation of five years upon a "suit or proceeding for the collection of any such taxes."

Section 250 (d) prescribes no limitation whatsoever upon the collection by warrant of distraint after assessment. With regard to taxes due under prior acts, the language of the section is that they "shall be determined and assessed within five years after the return was filed." The court below construed this provision as though it read "shall be determined and assessed *and collected* within five years after the return was filed." Such a construction reads into the Act a limitation not placed there by Congress, i. e., a limitation upon the collection of an assessment by executive process.

Moreover, distraint is not a "proceeding" within the meaning of Section 250 (d) to the effect that "no suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed." The "proceeding" referred to therein is obviously a judicial proceeding. That a judicial proceeding is referred to is apparent not only from the judicial construction of the term "proceeding," but also from the association of the word "proceeding" with the word "suit." A "proceeding" in its general

acceptation is "an act which is done by the authority or direction of the court—a judicial action or step—32 Cyc. 406. In a more particular sense, any application, however made, to a court of justice for the purpose of having a matter in dispute judicially determined; any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object." 32 Cyc. 406. A proceeding "has reference to something done or to be done in a court of justice." *Hopewell v. State*, 22 Ind. App. 489, 54 N. E. 127, 129. Distrainment is not a proceeding; it is not judicial, but is purely executive. *Acme Harvesting Machine Co. v. Hinkley*, 23 S. D. 509, 513; 122 N. W. 482.

In the case of *Murray's Lessee, et al., v. Hoboken Land & Improvement Co.*, 18 How. 272, the nature of a distress warrant issued by the Solicitor of the Treasury was thoroughly considered in a very able opinion of Mr. Justice Curtis, and it was held that it was an exercise of executive and not of judicial power, according to the meaning of those words in the Constitution.

That Congress did not intend by Section 250 (d) to place a limitation upon the time within which warrants of distrainment might issue to collect an assessment is further evident from examination of said section, because, if it had, it would surely have made the period of time within which such warrant must issue different from the period of time within which an assessment must be made, for a warrant

of distraint is dependent absolutely upon an assessment and can not issue without one. The assessment, therefore, must be made before the warrant of distraint can issue, and, if a limitation is to be placed upon collection by distraint, the period within which the warrant of distraint must issue should not begin to run until after the assessment is made.

By Section 250 (d) Congress prescribes a limitation of five years for the determination and assessment of income taxes under the prior statutes referred to therein; but if we say that there is also a five-year limitation upon the time within which a tax can be collected by distraint after assessment, and that such limitation begins to run at the same time that the limitation upon assessments begins to run, then in actual operation and effect there is not a full five-year limitation upon assessments; this for the reason that an assessment is worthless unless followed by distraint to collect the tax, and if the limitation upon distraint is the same as the limitation upon assessments, then assessments made near the end of the five-year period can not be collected, thus, in effect, making the limitation upon assessments less than five years.

The only correct construction is that the limitations contained in Section 250 (d) of the Revenue Act of 1921 are upon assessments and suits, and that the statute no more limits the time for collection by distraint after assessment than it limits the time for collection of a judgment by execution after suit. In short, there is no statute pre-

scribing the time limit within which a distraint warrant may be issued under Section 3186, et seq., of the Revised Statutes, after an assessment has been duly made. Of course, a distraint warrant can not issue without an assessment, but *the limitation is upon the assessment and not upon the distraint*. The word "proceeding" in Section 250 (d) of the Revenue Act of 1921 is used in its correct legal sense as meaning a judicial proceeding.

IX.

This suit is expressly forbidden by Section 3224 of the Revised Statutes. That Section contains no exceptions.

The only judicial decision relied upon by the court below was *Ogden City v. Armstrong*, 168 U. S. 224. (Record, p. 106.) The court's reliance upon *Ogden City v. Armstrong* and disregard of the decisions of this Court construing and applying Section 3224 R. S., prove the assertion made in an earlier part of this brief that the district court reached its conclusion by absolutely ignoring the inhibition contained in Section 3224, for the tax involved in *Ogden City v. Armstrong* was not a Federal tax, and consequently this court arrived at its decision in that case without regard to the provisions of Section 3224 of the Revised Statutes.

In *Union Pacific Ry. v. Cheyenne*, 113 U. S. 516, 526, cited by the court in *Ogden City v. Armstrong*, this Court said that "Even a cloud cast upon his title by a tax under which a sale could be made would be a grievance which would entitle him to go into a court

of equity for relief." But in *Dodge v. Osborn*, 240 U. S. 118, where a Federal tax was involved, and Section 3224 had to be considered, this Court held that cloud upon plaintiff's title, under the same circumstances as in *Ogden City v. Armstrong*, constituted no valid ground for relief by injunction. Can there be any question as to which decision this Court will choose to follow in this case?

This Court indicated by its language in the case of *Dodge v. Osborn*, referring to Section 3224, that there might possibly arise a case where "by some extraordinary and entirely exceptional circumstance its provisions are not applicable." Such a case had apparently not come to the attention of this Court up to the time of its decision in *Dodge v. Osborn*, but the kind of case it evidently had in mind was such as *Lipke v. Lederer*, 42 Sup. Ct. 549, where this Court held that the exaction was not a "tax," and that Section 3224 did not apply. Such a case might also arise where an unauthorized person attempts without color of office or of law to enforce distraint for the collection of an alleged tax; but it can never apply in a case like the one at bar, where the tax in some amount was indisputably due under a decision of this Court (*United States v. Phellis*, 257 U. S. 156); the amount of the assessment was correct under a decision of the Court of Claims of the United States (*Phellis v. United States*, 56 Ct. Cls. 157); the assessment was made by the Commissioner of Internal Revenue and claimed by him to be correct; and the collection was attempted by a method prescribed by

law and by an officer authorized by law to make such collections.

The correct rule was laid down in the very learned opinion of Mr. Justice Brewer in *Snyder v. Marks*, 109 U. S. 189, 193, and from it this Court has never departed. Mr. Justice Brewer said:

The inhibition of Section 3224 applies to all assessments of taxes, made under color of their offices, by Internal Revenue officers charged with general jurisdiction of the subject of assessing taxes * * *.

The application for relief in the case of *Snyder v. Marks* was on the ground that the limitation of time within which the assessment could be made had expired, and that the collection was being attempted by distraint in violation of the limitation of the statute. The case is therefore "on all fours" with the case at bar.

Section 3224 of the Revised Statutes of the United States was intended to apply exclusively to suits for the purpose of restraining the assessment or collection of the revenue. It was not enacted as a general limitation upon the jurisdiction of courts of equity, but as a prohibition against the interference of such courts with the assessment and collection of taxes by the general government and to require the payment of the tax as a condition precedent to the institution of a suit to test its validity.

By Section 19 of the Revenue Act of July 13, 1866, c. 184, 14 Stat. 152, the Congress of the United States prescribed the conditions upon which suits could be

brought for the recovery of any tax alleged to have been erroneously or illegally assessed or collected; the conditions being, briefly, the payment of the tax and an appeal to the Commissioner of Internal Revenue for the refunding thereof prior to the commencement of a suit. By Section 10 of the Act of March 2, 1867, c. 169, 14 Stat. 475, it was enacted that Section 19 of said Act of 1866 be amended "by adding the following thereto:"

And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court.

In the Revised Statutes this amendment of and addition to Section 19 of the Act of 1866 is made a section by itself, Section 3224, and reads thus:

No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

The word "any" was inserted by the revisers. *Snyder v. Marks*, 109 U. S. 189, 192; *Kensett v. Stivers*, 10 Fed. 517, 522.

As stated by Mr. Justice Blatchford in *Snyder v. Marks*, at p. 192:

The first part of Section 19 related to a suit to recover back money paid for a "tax alleged to have been erroneously or illegally assessed or collected," and the section, after thus providing for the circumstances under which such a suit might be brought, proceeded, when amended, to say that "no suit for the purpose of restraining the assessment or

collection of tax shall be maintained in any court." The addition of 1867 was *in pari materia* with the previous part of the section and related to the same subject matter. The "tax" spoken of in the first part of the section was called a "tax" *sub modo*, but was characterized as a "tax alleged to have been erroneously or illegally assessed or collected." Hence, when, on the addition to the section, a "tax" was spoken of, it meant that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed. It has no other meaning in Section 3224. There is therefore no force in the suggestion that Section 3224, in speaking of a "tax," means only a legal tax; and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute, and the collection of it may be restrained.

The statute inhibiting suits to restrain the assessment and collection of Federal taxes has been in effect in this country for practically fifty-six years, and when adopted was expressive of the law of the land as applied by courts of the United States from the early days of the Republic. Under it the revenue has been estimated with a degree of exactness and collected with a degree of certainty that would have been impossible without it. The emasculation of the statute by judicial decision would work havoc with the vital matter of collecting the public revenues.

Importance of the Decision.

The decision of this case is of great importance, for all governmental functions depend upon the prompt collection of the revenue.

If the collection of a tax can be restrained by injunction, the right to withhold payment until after all questions as to the amount, legality, and the manner of collection are determined by judicial decision, will be available to all taxpayers, who can afford the luxury of litigation. The taxpayer with a large income may well conceive it to be good business to spend a portion in proceedings in equity to delay payment.

Since the decision of the District Court in this case was published (283 Fed. 300) there has been a rush of taxpayers seeking to avail themselves of the remedy of injunction. For all practical purposes, in some judicial districts, it is as though Section 3224 had been repealed, for when a demand is made on a taxpayer for the payment of what he regards as an illegal assessment he files a bill for injunction, under authority of *duPont v. Graham*. While most of the District Courts refuse to grant even a temporary restraining order, others have felt free to do so, without notice, and a number of these are being continued at the present time awaiting the decision of this Court in this suit.

If taxpayers are to be permitted to try out in advance of payment doubtful questions as to the legality and correctness of tax assessments, the difficulty and expense of collecting the revenue will be increased many fold, and the practice will result in serious interference with the needed revenues of the Nation. As stated by this Court in *Nichols v. United States*, 7 Wall. 122, 129:

The prompt collection of the revenue, and its faithful application, is one of the most vital duties of government. Depending as the Government does on its revenue to meet, not only its current expenses, but to pay the interest on its debt, it is of the utmost importance that it should be collected with despatch, and that the officers of the Treasury should be able to make a reliable estimate of means, in order to meet liabilities.

It is unnecessary to discuss the wisdom or lack of wisdom of Section 3224; such questions are for the legislative branch of the Government. Nor is it considered necessary to discuss further the baneful results that flow from the issuance of injunctions to restrain the collection of taxes. The immediate results are all too obvious. If granted in one case, then all taxpayers dissatisfied with their assessments will seek the remedy rather than pay the tax. As wisely stated by the court in *Howland v. Soule*, Fed. Cas. 6800, 12 Fed. Cas. 743, 744:

A person not pleased with a tax will readily conclude that it is illegal or erroneous, and a

suit for injunction follows * * *. To "tax and to please, no more than to love and be wise, is not given to man."

JAMES M. BECK,
Solicitor General.

NELSON T. HARTSON,
Solicitor of Internal Revenue,

CHESTER A. GWINN,
Attorney, Treasury Department,
of Counsel.

APRIL, 1923.





No. 846.

OCTOBER TERM, 1922.

APR 23 1923

FILED

WM. H. STANBURY

IN THE
Supreme Court of the United States

HARRY T. GRAHAM, Individually and as Former Col-
lector of Internal Revenue et al., Petitioners,

vs.

ALFRED I. DU PONT, Respondent.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE THIRD DISTRICT.

BRIEF FOR RESPONDENT.

WILLIAM A. GLASGOW, JR.,
HENRY P. BROWN,

Counsel for Respondent.



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In the Supreme Court of the
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OCTOBER TERM, 1922. No. 846.

*Harry T. Graham, Individually and as Former Collector
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vs.

Alfred I. duPont, Respondent.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR
THE THIRD DISTRICT.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

The E. I. duPont de Nemours Powder Company (hereinafter called Jersey Company) was incorporated in 1903 under the laws of New Jersey and was engaged until October 1, 1915, in the manufacture and sale of explosives, and on that day, in pursuance of a "Plan of Financial Reorganization", transferred all its assets as an "entirety" and "as a going concern" to E. I. duPont de Nemours and

Company (hereinafter called Delaware Company) organized under the laws of the State of Delaware and thereafter the latter Company conducted the same business.

At all times since the organization of Jersey Company in 1903 and on September 30, 1915, Alfred I. duPont, respondent, was the owner of 37,767 shares of the common stock of that Company, and from the year 1912 all of said shares of stock stood in his name on the books of said Company.

In consideration of the transfer of all its assets, goodwill, etc. "as a going concern" to Delaware Company, the Jersey Company received 596,617 shares of debenture stock and 588,542 shares of common stock of Delaware Company, each share of the par value of \$100, making a total par value of \$118,515,900, and of this amount \$30,234,600 of debenture stock was exchanged by the Jersey Company for its outstanding preferred stock and Thirty Year Bonds; the balance of the debenture stock, of the par value of \$29,427,100 was retained by the Jersey Company in its treasury. The 588,542 shares of the common stock, of the par value of \$58,854,200 was immediately distributed among the common stockholders of the Jersey Company; each stockholder of that Company receiving two shares of common stock of the Delaware Company for each share of common stock held by him in the Jersey Company, in which latter Company he retained his stock. By this distribution the respondent, Alfred I. duPont, received on or about October 1, 1915, a total of 75,534 shares of common stock of Delaware Company of the par value of \$100 per share and retained his 37,767 shares of the common stock of Jersey Company.

When this financial reorganization was proposed to the stockholders of Jersey Company, respondent objected to it on two grounds, to wit: (1) that there was no necessity or occasion for such reorganization, and (2) that the value of the assets of Jersey Company to be transferred to the Delaware Company did not justify the issue by that Company of the \$58,854,200 of common stock, paid up

in full. Respondent was then informed by the Treasurer of Jersey Company that this latter objection would be met by *writing up* on the books of the Company the value of profits which the Company expected to make in the manufacture of explosives under certain contracts with the Allies engaged in the European War, thus making the assets appear on the books as equal on October 1, 1915, to the par value of the stock issued by the Delaware Company (Rec. p. 14). The contracts aforesaid were unperformed and on a great number of them deliveries were not to begin until February, 1916. As a matter of fact, the estimated value of these *prospective profits were written up* on October 1, 1915, in the sum of \$29,152,116.75 in order to apparently show on the books of the Company that the assets were equal to the par value of the common stock issued, to wit, \$58,854,200. As of the day that this "write up" of assets was made on the books of the Company to show assets equal in value to the par value of the common stock, of \$100 per share, the Government now values the common stock for tax purposes at \$347.50 per share.

This is the valuation for income tax purposes which the Government now intends to enforce by distraint upon respondent's property, notwithstanding the fact that this Court in the case of United States *vs.* Phellis, 257 U. S. at page 170 held, as to this very common stock that:—

"The common stock of the new Company, after its transfer to the old Company and prior to its distribution, constituted assets of the old Company which it now held *to represent its surplus of accumulated profits* * * *. But when this common stock was distributed among the common stockholders of the old Company as a dividend, then at once * * * the individual stockholders of the old Company * * * received assets of exchangeable and actual value * * * as the *result of a division of former corporate profits*, and drawn by them severally for their individual and separate use and benefit." (Italics ours.)

This Court found that this common stock of Delaware Company was held to "represent its surplus of accumulated profits" and yet while it appears that on October 1, 1915 there was a *write up* on the books of the Company of \$29,152,116.75 of *prospective profits* in order to show assets sufficient to issue the common stock at par, \$100 per share, *the Government now threatens distraint against respondent to recover taxes for 1915 based on a valuation by it, of this stock, as of the day of the write up, of \$347.50 per share.*

On March 1, 1916, respondent filed his return of personal income for the year 1915 and "attached a statement in writing fully setting forth the entire transaction under which he received the 75,534 shares of common stock of the Delaware Company aforesaid" (Affidavit of Alfred I. duPont, Rec., p. 14).

Petitioner, Graham, in his affidavit, denies that such statement was filed by respondent, but does not deny that "95 per cent. of the stockholders, including all of the large stockholders of the Delaware Company, attached a like statement to their and each of their personal returns of total income for the year 1915, filed on March 1, 1916" (Rec., p. 15).

The Bureau of Internal Revenue considered, for some time, the question of liability for income tax of those receiving the common stock of the Delaware Company and advanced several inconsistent theories of liability with regard thereto, as follows:—

First.—The Commissioner of Internal Revenue took the position that this common stock of the Delaware Company represented a *stock dividend* when issued to stockholders of Jersey Company and, on that basis, assessed one of the stockholders of the latter Company, valuing the stock at \$100 per share. The stockholder was required to pay the assessment under protest and suit is now pending to recover the money so paid. Afterwards *Towne vs. Eisner*, 245 U. S. 418, was decided by this Court and this theory of liability was abandoned by the Commissioner.

Second.—Late in the year 1918 or early 1919, the Commissioner's office evolved the theory that this distribution of common stock of the Delaware Company to the stockholders of the Jersey Company "*was a liquidation dividend*" and that stockholders of the Jersey Company receiving the same were taxable to the extent that the fair market value of the stock received by them "exceeded the cost to them or the fair market price or value as of March 1st, 1913, of their stock in the old corporation in stock of which the distribution was made." (See Affidavit Alfred I duPont, Rec., p. 15.) This theory was afterwards abandoned by the Commissioner of Internal Revenue.

Third.—In June, 1919, the Commissioner's office began discussing this transaction on the theory that it was "a property dividend." Counsel for the respondent interviewed the Commissioner at this time, who then referred the matter to the "Advisory Tax Board" created by the Act of 1918, Sec. 1301, d-2, which provided:—

"The Commissioner may and on request of any taxpayer directly interested *shall* submit to the Board any question relating to the interpretation or administration of the income, war profits or excess profits tax laws, and the Board *shall report its findings and recommendations* to the Commissioner." (Italics ours.)

Counsel for respondent appeared at a hearing before said Board at Washington on June 30, 1919, and the matter was discussed orally and by brief, but the Board never made a report and after waiting until October 28, 1919, counsel for respondent on that day wrote to the Commissioner asking if something could not be done to bring the matter to a conclusion. To this letter the Commissioner never made reply.

The first intimation that respondent had that the Commissioner contemplated proceeding against him was on January 1, 1920, when he received from the collector,

Graham, a tax bill demanding the payment within ten days of \$1,576,015.86 and as respondent subsequently learned the Commissioner claimed as the basis of this demand that the common stock of the Delaware Company received by respondent on October 1, 1915, "was a dividend in property" and that "the fair market value" of the stock when received was \$347.50 per share". (Exhibit 15, Rec., p. 73.)

Respondent filed a claim in abatement of this demand.

Thereafter, in response to a request "from one of the members of one faction" of stockholders of the duPont Company "who, I think, is willing to pay the taxes, but thinks it better to wait until a decision of the Court", the Commissioner agreed "to withhold action on the claims for abatement" of the stockholders represented by Mr. F. S. Bright and Mr. J. P. Laffey. Subsequently, "the same courtesy" was extended to respondent and other stockholders who were not of the "faction" who were "willing to pay the taxes". (See Exhibit 17, Rec., p. 79.)

The case of U. S. vs. Phellis, 257 U. S. 156.

Phellis was "one of the members of the faction" of "stockholders of the duPont Company" who was willing to pay the taxes but "thinks it better to wait until a decision of the Court", (Exhibit 17, Rec., p. 79, Memo. G. M. March 10, 1920), and after the proposition contained in the letter of February 16, 1920 from F. S. Bright to the Commissioner of Internal Revenue (Exhibit Ex. 17, Rec., p. 79) and the acceptance thereof, Phellis withdrew his claim in abatement, paid the tax, under protest, and brought his suit in the Court of Claims to recover the amount paid. In the petition filed in the case, Phellis "admitted that the fair market value of each share was \$347.50" and the evidence offered in support of this admission was the private sales between brokers of small lots of the stock aggregating 183 shares, out of the 588,542 shares outstanding, the stock not being listed on any market and there being no public sales. The method of keeping the price up in the

sale of the small lots which were sold is shown in the affidavit of Alfred I. duPont (Rec., pp. 24, 25). As soon as counsel for respondent saw the record in the Phellis case, he immediately wrote Mr. F. S. Bright urging that the fair market value of the stock was not in excess of par or \$100 per share (the value which the Commissioner had fixed when he made the first assessment on the basis of a stock dividend) and insisting that the assessment of the stock at \$347.50 per share was grossly unfair and that this valuation of the stock ought to be attacked in the Phellis case. (See letters of Wm. A. Glasgow, Jr., to F. S. Bright of February 21st and October 1, 1921, in affidavit of Alfred I. duPont. Rec., pp. 18, 19.)

These letters were referred by Mr. Bright to his associate, Mr. J. P. Laffey, General Counsel of the Company, who represented the faction of stockholders "willing to pay the taxes" just as soon as "a decision of the Court" could be secured sustaining the tax.

On February 24th, Mr. J. P. Laffey replied to these letters of counsel for Alfred I. duPont, saying (Rec., p. 20):—

"With respect to your tentative suggestion that we make the further contention that in the event the Court finds this distribution to be taxable that the book value of the stock be taken as the basis of taxation and not the market value as the Government contends, I have given consideration to this and I desire to confirm my first impressions that it would not be to our interests as a question of policy to make this claim in this suit. * * * Again many interested stockholders prefer, if they are legally required to pay any tax on this distribution, to pay on the basis of \$347.50 and obtain the advantage of having this stock on their books at this rate."

In other words, such stockholders calculated that they would make money by paying on this valuation under the rates of 1915, and take credit for losses on sales by them

in subsequent years, when the rates were much higher than 1915.

The respondent had neither bought nor sold any of this stock. What he held constituted his estate, and his effort to have the Court pass on the fair value of the stock was unsuccessful.

Counsel for respondent, filed a brief, as *amicus curiae*, in the Court of Claims in which he said, (Rec., p. 21):—

“While some few shares of the New Jersey Company sold for \$795 per share and of the Delaware Company sold for \$347.50 per share no considerable part of the stock could have been sold at such figures, and this was the only evidence of valuation for assessment by the Government and was an ‘unsafe criterion’. *Eisner vs. Macomber*, 252 U. S. at p. 215.”

And the brief for Phellis in this Court had the following note (Rec., p. 21):—

“While some few shares of the New Jersey Company stock sold in the market for \$795.00 per share, and the Delaware Company stock for \$347.50 per share, no considerable part of this stock could have been sold at such figures, and this was the only evidence of valuation used by the Government in the assessment and was an ‘unsafe criterion’, (*Eisner vs. Macomber*, 252 U. S. at p. 215). The book value of the stock was entirely disregarded, and this showed the Delaware Company stock worth not more than par. If the assessment had been based upon par as was attempted in *Towne vs. Eisner*, the plaintiff would have been charged with income of only \$50,000 instead of being charged with income of \$173,750.00 as he is.”

Counsel for respondent was never able to get the question of the value of this stock fairly before the Court of Claims, but that Court adopted the value of \$347.50 per share, admitted by the plaintiff, Phellis.

The Court of Claims held that the common stock of the Delaware Company received by the stockholders of Jersey Company was not taxable as income. On appeal, this Court (by a divided Court), reversed the Court of Claims, holding that the stock received as above set forth, was taxable as income at its fair value when received.

The opinion of this Court in the Phellis case was rendered on November 21, 1921, and on November 23, 1921, the Revenue Act of 1921 became a law.

It appears from the record that on March 1, 1916, respondent filed his income tax return for the year 1915 (Exhibit 1, Rec., pp. 40-45) and to correct an error therein as shown by Exhibit 2, respondent filed an amended income tax return about the second of March, 1916 (Exhibit 4, Rec., pp. 47-51).

On November 30, 1917, Internal Revenue Agent Forbes, at Baltimore, wrote the Commissioner of Internal Revenue giving him a report of Income Tax Inspector D. P. DuRoss of November 27, 1917, referring to the personal income tax returns of Alfred I. duPont for the years 1913, 1914 and 1915, and in referring to the common stock of the Delaware Company received by Alfred I. duPont on October 1, 1915, DuRoss reports as follows (Rec., p. 55):—

“200% common stock dividend issued by
E. I. duPont de Nemours Co., previously omitted \$7,553.400.00”

In other words, duRoss reported this dividend and placed a valuation thereon of \$100 per share and recommended that upon this basis an additional tax of \$455,246.07 should be assessed against the respondent for the year 1915.

Nothing further seems to have been done until on the 30th day of July, 1919, when Internal Revenue Agent in charge at Baltimore, McDannel, wrote the Commissioner of Internal Revenue, with reference to a re-investigation of the income tax return of Alfred I. duPont for the year 1915, and set forth a copy of a report made by Internal Revenue Agents

Joseph N. Benners and D. P. duRoss. (Exhibit 12, Rec., pp. 67-71.)

In this report the Internal Revenue Agents treat the distribution to respondent as being "in the nature of a liquidating dividend" (Rec., p. 69), and the estimated profit of \$19,450.005.00 was arrived at in the following manner (Rec., p. 70):—

"In determining the profits alleged to have resulted in 1915 from the distribution of two shares of common stock of E. I. duPont de Nemours & Co., or new company, for each share held in the E. I. duPont de Nemours Powder Co., or old company, the examining officers have taken \$180.00 as the fair market value of the old common stock as of March 1, 1913, and \$347.50 as the fair market value of the new stock at the time it was distributed."

Mr. McDannel's letter concluded as follows (Rec., p. 71):—

"As the taxpayer has declined to sign an amended return or waiver for 1915, I recommend that suit be instituted under the Act of October 3, 1913, for \$1,363,542.42.

"Amended return for 1915, unsigned, is herewith endorsed."

The "amended return" enclosed by McDannel on July 30, 1919, to the Commissioner, *unsigned by anybody*, appears in the record as Exhibit 6 (Rec., pp. 57-62), and no amended return was ever made for Alfred I. duPont either by the Commissioner, the Collector, or Deputy Collector, and the basis of liability in this report and blank form of return was not adopted or approved by the Commissioner.

On January 1, 1920, the Collector presented a demand upon Alfred I. duPont for a further tax for the year 1915 in the sum of \$1,576,015.86, which sum was arrived at by a

valuation of the 75,534 shares of common stock of the Delaware Company received by Alfred I. duPont on October 1, 1915, at \$347.50 per share, amounting to \$26,248,065.00 without any deduction for the valuation of the common stock of the Jersey Company held by him as of March 1, 1913. The demand of the Collector was not based upon any theory of liability which had theretofore been suggested in any of the reports upon the subject. (See Exhibit 13, Rec., p. 71.)

On January 30, 1922, the Bill in this case was filed in the District Court of the United States, for the District of Delaware, averring that the Collector of Internal Revenue, unless restrained, would proceed to levy and sell the property of Alfred I. duPont to pay this demand, and setting up that the Act of Congress forbade the attempt to collect the claim above mentioned; that the Collector had no right or authority in law to proceed to collect the claim by distraining upon the property of respondent, and that respondent was without remedy at law to enforce his rights.

On March 3, 1922, there was a hearing on plaintiff's motion for a preliminary injunction and on defendant's motion to dismiss the Bill of Complaint. In June, 1922, the District Court overruled the motion to dismiss the Bill, and granted the preliminary injunction, limiting the injunction, however, to restraining the defendant from collecting "or attempting to collect by distraint" the sum of money claimed by the Collector and provided that "this injunction, however, shall not operate to prevent a suit by the United States in a court having jurisdiction thereof, to recover from the said Alfred I. duPont any sum or sums of money which the United States may be advised it is entitled to." (Rec., p. 108.)

Collector Graham appealed from this decree to the Circuit Court of Appeals for the Third Circuit and that court affirmed the decree of the District Court.

The case is now in this court on writ of *certiorari* to the Circuit Court of Appeals for the Third Circuit.

ARGUMENT.

Respondent's position is based upon the following principal propositions:

A. A DISTRAINT BY THE PETITIONERS FOR THE PURPOSE OF COLLECTING THE ADDITIONAL INCOME TAX CLAIMED TO BE DUE FROM RESPONDENT FOR THE YEAR 1915, WOULD BE WITHOUT AUTHORITY OF LAW AND IN VIOLATION OF EXPRESS STATUTORY INHIBITION.

B. SECTION 3224 OF THE REVISED STATUTES DOES NOT PRECLUDE THE RESPONDENT FROM EQUITABLE RELIEF.

The first of these propositions ("A") is based upon the following contentions:—

1. The alleged assessment under authority of which the distraint is proposed to be made, is without authority of law, illegal and void.

2. The threatened distraint would be in violation of the express inhibition of Section 250 (*d*) of the Revenue Act of 1921.

These contentions will be considered in their respective order:

A-1. The alleged assessment under authority of which the distraint is proposed to be made, is without authority of law, illegal and void.

No extensive argument is necessary in support of the proposition that the threatened seizure and sale of appellee's property will be illegal and invalid, unless the tax claimed has been duly and properly assessed and the threatened proceedings are authorized by statute.

"As the collector has no general authority to sell lands at his discretion for the non-payment of the direct tax, but a special power to sell in the particular cases described in the act, those cases must exist, or

his power does not arise. It is a naked power, not coupled with an interest; and in all such cases, the law requires that every pre-requisite to the exercise of that power must precede its exercise; that the agent must pursue the power, or his act will not be sustained by it."

Williams vs. Peyton, 17 U. S. 77, 79.

"A collector selling lands for taxes must act in conformity with the law from which his power is derived."

Early vs. Doe, 16 How. (U. S.) 610, 618.

"To divest an individual of his property, against his consent, every substantial requisite of the law must be shown to have been complied with."

Ronkendorff vs. Taylor's Lessee, 4 Pet. (U. S.) 349, 359.

"Summary proceedings are commonly authorized by law and resorted to for the collection of taxes.
* * * But a law of this kind is strictly construed and will not be extended by implication, and strict compliance with its provisions is essential to the validity of the proceedings."

37 Cyc. 1231.

The following statutory provisions relate to the time and method of assessment of income taxes for the year 1915, under the Revenue Act of 1913:—

"That all assessments shall be made by the Commissioner of Internal Revenue and all persons shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the dis-

covery thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this section or by existing law, and the assessment made by the Commissioner of Internal Revenue *thereon* shall be paid by such person or persons immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of 5 per centum on the amount of tax unpaid, and interest at the rate of 1 per centum per month upon said tax from the time the same became due, except from the estates of insane, deceased or insolvent persons." (Italics ours.)

(Income Tax Act of 1913, Sec. E.) 38 Stat. at Large, 169.

"When any person, corporation, company or association refuses or neglects to render any return or list required by law, or renders a false or fraudulent return or list, the collector or any deputy collector shall make, according to the best information which he can obtain, including that derived from the evidence elicited by the examination of the collector, and on his own view and information, such list or return, according to the form prescribed, of the income, property, and objects liable to tax owned or possessed or under the care or management of such person or corporation, company or association, and the Commissioner of Internal Revenue shall assess all taxes not paid by stamps, including the amount, if any, due for special tax, income or other tax, and in case of any return of a false or fraudulent list or valuation intentionally he shall add one hundred per centum to such tax; and in case of a refusal or neglect, except in cases of sickness or absence, to make a list or return, or to verify the same as aforesaid, he shall add fifty per centum to such tax."

(Rev. Stat. Sec. 3176, as amended by the Income Tax Act of 1913.) 38 Stat. at Large, 179.

From these provisions it appears that:—

(a) No assessment could be properly made after June 1st, 1916, with respect to the respondent's income for the year 1915, unless the return filed by the respondent for that year was "false or fraudulent."

(b) If the return filed by the respondent was "false or fraudulent," no return could be properly made by the commissioner, collector or deputy collector after three years from March 1, 1916, upon which date respondent's return for the year 1915 was due and was made.

(c) If said return was "false or fraudulent" an additional assessment, to be valid, must have been based upon such return.

(d) The return upon which an assessment is based, must be made by the Commissioner, Collector or Deputy Collector and must be according to the form prescribed.

(a) It has been held that the proper meaning of the word "false" as used in the foregoing statutes is "not true" or "incorrect." (*Woods vs. Lewellyn*, 252 Fed. 106, 109, C. C. A. 3rd, Cir.) We will assume for argument's sake only, that this construction is correct.

(b), (c) and (d):—

1. No return was made by the Commissioner, Collector or Deputy Collector on behalf of the respondent within three years from March 1, 1916, or at any other time.

2. The alleged return relied upon by the petitioners and which appears at pages 57-62 of the Record as Exhibit 6, was not prepared until July, 1919.

3. The said alleged return was not made by the Commissioner, Collector or Deputy Collector.

4. The said return was not made "according to the form prescribed."

5. The assessment alleged to have been made by the Commissioner in December, 1919, was not based upon the alleged return.

The only return alleged by petitioners to have been filed upon behalf of the respondent is that which is designated as Exhibit 6 (Rec., pp. 57-62). In the affidavit filed by petitioner Graham, that return is referred to as follows (Rec., pp. 33-34):—

"Affiant is informed and believes, from an examination of the records of the Bureau of Internal Revenue, that on November 27, 1917, Income Tax Inspector D. P. duRoss made a report to the Revenue Agent in Charge at Baltimore (Exhibit 5) showing the result of an investigation made by him of the complainant's tax liability for the years 1913, 1914, and 1915, and in said report said Inspector reported among other things that the complainant had received an income during the year 1915 '200 per cent. common stock dividends issued by E. I. duPont deNemours Co., previously omitted,' and that as a result of such investigation and other investigations the Commissioner of Internal Revenue, in the regular routine of office procedure, prepared a return upon information as provided for by Section 2E of the Income Tax Act of October 3, 1913 (Exhibit 6)."

Thus the petitioner studiously avoided any reference to the precise date when the alleged return was prepared, but insinuated that it was prepared by the Commissioner shortly after his receipt of Mr. D. P. duRoss' report dated November 27, 1917, and, therefore, well within the three year period dating from March 1, 1916.

An examination of Exhibit 5 (Rec., p. 52), which sets forth the report made by Income Tax Inspector D. P.

duRoss under date of November 27, 1917, and Exhibit 12 (Rec., p. 67), which is a letter from the Internal Revenue Agent in Charge of the Baltimore Division, setting forth a copy of a report made by Examiner D. P. duRoss and Joseph N. Benners under date of *July 22, 1919*, shows beyond any question that the alleged return referred to by the petitioner Graham as Exhibit 6, was not prepared by the Commissioner, as stated by said appellant, nor was it prepared by the Collector or Deputy Collector.

Upon the contrary, the alleged return was prepared by the inspectors or examiners already named, and was attached to their report of *July 22, 1919*, to which we have referred. In that report the said return is referred to by said inspectors in the following language (Rec., p. 69):—

“Unsigned amended return attached, respondent declining to sign either amended return or waiver.”

It is the same alleged return which is again referred to by the Internal Revenue Agent in Charge, on the final page of Exhibit 12, and under date of *July 30, 1919*, as follows (Rec., p. 71):—

“Amended return for 1915, unsigned, is herewith enclosed.”

The facts show, therefore, that no return was filed upon behalf of the respondent within three years from March 1, 1916, and the District Judge so found, stating, (Rec., p. 103):—

“The evidence clearly shows that this amended return was made not earlier than *July 22, 1919*.”

Nor is there any evidence that the Commissioner or Collector ever adopted or gave effect to the alleged return known as Exhibit 6. Upon the contrary, the said return is neither signed nor sworn to by anyone and is not “according to the form prescribed” in that it fails to comply with

the sixth paragraph of the "Instructions" on the last page of said return, which reads as follows:—

"6. This return, properly filled out, must be made under oath or affirmation. Affidavit may be made before any officer authorized by law to administer oaths."

Moreover, the assessment alleged to have been made by the Commissioner in December, 1919, was not based upon the alleged return under discussion.

The Revenue Act of 1913 requires, as already shown, that the assessment made by the Commissioner shall be based upon a return made as provided for by the Act.

The alleged return relied upon by the petitioners shows a total tax liability of \$1,549,178.06 (Rec., p. 58), of which \$185,635.64 had been paid, leaving a balance of \$1,363,542.64 alleged to be due (Rec., p. 68).

The additional tax alleged to have been assessed by the Commissioner, however, was for \$1,576,015.86, and this figure was based not upon the aforesaid return, but upon an audit referred to in the Commissioner's letter to the Internal Revenue Agent in Charge at Baltimore, dated December 12, 1919, and known as Exhibit 13 (Rec., p. 71).

In the alleged amended return, (Exhibit 6), which was forwarded as a part of that letter, (Exhibit 12), it is shown that the Internal Revenue Agent in Charge, valued the 75,534 shares received by the appellee, at \$347.50 per share, or a total of \$26,248,065, and deducted therefrom the fair market value per share on shares held on March 1, 1913, to wit: 37,767 shares at \$180 per share, or a total of \$6,798,060, leaving an alleged "profit" subject to taxation of \$19,450,005 (Rec., p. 69), and this latter figure appears on page 1 of Exhibit 6 as "taxable income"; whereas the Commissioner in his letter of December 12, 1919, (Exh. 13, Rec., pp. 71, 72) based his claim for \$1,576,015.86 on 75,534 shares of stock at \$347.50 per

share, a total alleged profit of \$26,284.065, without any deduction for value of shares as of March 1, 1913. So that neither the claim of the Commissioner under the letter of December 12, 1919, nor the alleged assessment then made, were based upon Exhibit 6, or any other amended return made for the respondent.

To summarize:

1. The only return alleged by petitioners to have been made upon behalf of respondent, was not made until July 1919, or thereafter.

2. The alleged return relied upon by the petitioner was not such a return as was contemplated by the Act, as it was not made by the persons designated or in the manner prescribed.

3. The assessment was not based upon the alleged return.

4. The assessment was not made until December, 1919.

We submit, therefore, that in making the assessment which is relied upon by the petitioners to justify the threatened distraint, the Commissioner not only failed to comply with the requirements of the law, but was without any jurisdiction whatever to make that assessment at the time that it was made. Under these circumstances the assessment is not merely irregular but void.

"What is complained of is no mere irregularity or error in the assessment. As we have seen, there was an entire want of jurisdiction in the common council to proceed for want of the assent of the requisite proportion of property owners, and the assessment and tax were, therefore, void."

Ogden City vs. Armstrong, 168 U. S. 224, 237.

It follows that there is no basis for any summary proceedings by distraint to enforce payment of the additional tax claimed by the petitioners.

In the foregoing argument we have proceeded upon the assumption that Section E of the Income Tax Act of 1913, already quoted, requires the return to be made by the Commissioner, Collector or Deputy Collector "within three years *after said return is due.*"

This construction is so obviously in accordance with the letter as well as the spirit of the provisions in question and is so manifestly reasonable, that it would require no argument in its support were it not for the fact that the petitioners have seriously asserted a wholly different construction of those provisions.

The petitioners contend that the three years period referred to in Section E of the Act relates merely to the time within which the discovery of the omission of income must be made, and has no reference to the period within which the Commissioner must file a return. This is likewise the position taken by the Commissioner in his letter of February 3, 1920, addressed to the respondent (Rec., p. 76).

For convenience we again quote the relevant provisions of the Act of 1913, as follows:—

"That all assessments shall be made by the Commissioner of Internal Revenue and all persons shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this section or by existing law, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such person or persons immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collec-

tor, there shall be added the sum of 5 per centum of the amount of tax unpaid, and interest at the rate of 1 per centum per month upon said tax from the time the same became due, except from the estates of insane, deceased, or insolvent persons."

Under the construction contended for by the appellants, if any error was discovered by the Commisisoner within three years, he would have had authority *at any time thereafter*, no matter how remote, to make a return and assessment and proceed to collect the tax by summary process.

Under this construction the authority of the Commissioner to proceed by summary proceedings, would not necessarily be determined by any matter of record, but would depend entirely upon whether he or his predecessor in office had knowledge of the error within the three years period. The burden would be upon the taxpayer to disprove such knowledge and this whether the Commissioner was alive or dead or otherwise unobtainable as a witness. Thus every case wherein a return was filed after the three years period would necessarily involve the question of fact as to whether the alleged error had been discovered within said period by the Commissioner then in office.

Under the construction contended for by the petitioners, it might be argued that however insignificant the error discovered by the Commissioner within the three years period, he would be at liberty at any time thereafter to make a return and assessment rectifying not only the alleged error so discovered, but any other alleged errors discovered thereafter. That very question, in fact, would under the said construction arise in the present case.

As opposed to the petitioners' construction, the respondent contends:—

First.—That even assuming for argument's sake merely, that there is a doubt as to the proper construction of the provisions in question, that doubt should be resolved in favor of the taxpayer.

"When a statute providing for taxation is of doubtful construction, the doubt is to be resolved in favor of the taxpayer." 22 Cyc. 1605.

Second.—If it had been the intention of Congress to make the three years period applicable solely to the discovery of error, that intention would have been unmistakably signified by the omission of the comma after the word "thereof", so that the clause would have read as follows:

"* * * the Commissioner of Internal Revenue shall, upon the discovery thereof at any time within three years after said return is due, make a return
* * *

Third.—If the three year period is considered as applicable to the return, the application of the Section will not depend upon the uncertain or prejudiced memories of Commissioners, or the credibility of their testimony, or their availability as witnesses, but upon the contrary, will be determined by a concrete matter of public record. That record is afforded by the return which must be filed within the three years and the assessment must be based on that return. Otherwise the government must sue for the tax claimed and the taxpayer is entitled to protection against summary procedure.

That the three years period applies to the return and assessment, is recognized in the following quotation from **Woods vs. Lewellyn** 252 Fed. 106, 109, (C. C. A. 3rd Cir. 1918):

"The tax for 1913 was not *assessed* until May, 1915; but this was in time under paragraph E, if the plaintiff's return was 'false'." (Italics ours.)

In other words, it is assumed by the Court that it is the *assessment* and not the *discovery* which determines the applicability of the three year period.

In *Eliot Nat. Bank vs. Gill*, 218 Fed. 600, 602 (C. C. A. 1st Cir.), and in *Penrose vs. Skinner*, 278 Fed. Rep. 284,

286, 287 (District Court, Colorado, 1921), the dicta of the Courts is opposed to respondent's contention, but the reasoning upon which the conclusions are based is not set forth.

In Montgomery's Income Tax Procedure, Ed. 1922, p. 196, foot note 17, our view is stated by the author as follows:—

"The Bureau claims (B. 49-20-1337; Sol. Op. 79) that if a 'discovery' shall have been made within three years from the time the return was due assessment may be made at any time thereafter. Such, however, could hardly have been the intention of the law. The punctuation conveys to the author the very clear meaning that assessments must be made immediately after discovery and the additional tax must be paid upon demand and that the discovery and the assessment must be made within three years from the time when the return was due. Any other construction requires a vivid imagination. As the section covers the imposition of penalties it should be construed in favor of the taxpayer. The United States courts have not specifically passed upon the question. In a suit brought within three years from the time when a return was due (Eliot National Bank *vs.* Gill, 218 Fed. 600) the court said that the tax could be assessed after three years if the fact that it was due was discovered within the three years. But the point in question was not before the court, so the statement is dictum, and need not be considered a precedent."

We submit, therefore, that the three year period relates to the time during which the return must be made.

A clear recognition of the impropriety of summary proceedings after the expiration of three years from March 1, 1916, is found in the following paragraph quoted from the last page of the letter of July 30, 1919, addressed to the Commissioner by the Internal Revenue Agent in Charge of the Baltimore Division (Rec., p. 71):

"As the taxpayer has declined to sign an amended return or waiver for 1915, I recommend that suit be

instituted under the Act of October 3, 1913, for \$1,363,542.42."

The second contention in support of our principal proposition that the threatened distraint would be without authority of law and in violation of express statutory inhibition is, as already stated, as follows:—

A-2. The threatened distraint would be in violation of the express inhibition of Sec. 250 (d) of the Revenue Act of 1921.

The material provisions of that section read as follows:—

"(d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commisisoner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under Section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act."

On January 30, 1922, when this proceeding was instituted, more than five years had expired since March 1, 1916, when

respondent's return was filed, and a distraint or seizure of his property at that time would have constituted a "proceeding" within the inhibition of the provisions quoted above.

That this is the proper construction of the foregoing provisions appears unmistakably from the fact that they forbid a *determination* and *assessment* after the five year period "unless both the Commissioner and taxpayer consent in writing to a later determination, assessment and collection of the tax."

In other words it was recognized by Congress that consent to merely a *determination* and *assessment* of the tax after the five year period would be futile, because even if the tax should be thus determined and assessed, its *collection* would still be impossible because of the provisions forbidding the commencement of "any suit or proceeding for the collection" of the tax after the five year period.

In order to make the consent of the taxpayer effective, therefore, it was provided that it should relate not only to the *determination* and *assessment* of the tax but to its *collection*.

That the phrase "*proceeding for the collection of any such taxes*" as used in Sec. 250 (d) contemplates a *collection by distraint*, is also evidenced by other provisions of the Revised Statutes.

Sec. 3190 R. S. provides for "*Proceedings on Distraint.*" (U. S. Compiled Statutes, 1901.) Sec. 3187 R. S., provides that in case of refusal or neglect to pay any taxes, the Collector may "collect the said taxes * * * by distraint." Sec. 3196 R. S. provides that "When goods, chattels, or effects sufficient to satisfy the taxes imposed upon any person are not found by the Collector or Deputy Collector, he is authorized to collect the same by seizure and sale of real estate." Sec. 3197 R. S. deals with "Proceedings for seizure and sale of real estate for taxes." (U. S. Compiled Statutes, 1901.) Sec. 3207 R. S. provides that where it has become necessary to seize and sell real estate to satisfy taxes, the Commissioner may direct a Bill in Chancery to be filed, bringing in all persons interested in said real estate, and decree a sale thereof and distribute the proceeds.

The foregoing statutes designate the *proceedings* which are available to the Collector *for the collection of a tax*, and are obviously contemplated by the inhibition of Sec. 250 (d) against any "*proceeding for the collection of any such taxes.*"

Congress could have had no reasonable object in prohibiting, after the five year period, such a suit as is contemplated by Sec. 3207 R. S., while allowing a distraint or seizure after that period under Secs. 3187 and 3196 R. S. Likewise, if, as petitioners claim, Congress had intended to impose no time limit upon the right of the Government to collect a tax by *distraint*, provided an assessment had been made within five years from the time the tax was due, it is difficult to understand why, in a case where such an assessment had been made, Congress expressly prohibited the collection of such tax by suit after the expiration of said period.

The remedy of distraint has always been the customary method employed to collect taxes, and it has been only in very exceptional cases that the Government has ever resorted to suit. What purpose could Congress have had in mind in depriving the Government of an extraordinary remedy rarely used, while leaving unaffected the customary proceeding by distraint? The obvious intention of Congress was to protect the taxpayer. But what possible reason could there be for protecting him against procedure almost never employed by the Government, if no protection was to be afforded him against the usual and ordinary method of proceeding by distraint?

Also, under the theory advanced by the petitioners, the words "or proceedings" would have comprehended only that which would be included in the ordinary definition of the word "suit," and would, therefore, have been mere surplusage.

In Montgomery's Income Tax Procedure, Ed. 1923, the argument is well stated at page 222:—

"The use of the word "proceeding" in the 5-year limit for suits also shows that Congress meant that the taxpayer must receive notice within five years.

The words 'determined and assessed' certainly cannot include the distraint warrant. The word 'proceeding' was no doubt intended to cover distraint warrants. There would be no meaning in having an amount payable if it could not be collected either by distraint or suit. The Treasury does not agree with this interpretation of the word 'proceeding.' A ruling has been issued (I-37-504; I. T. 1446) holding that the word 'refers only to judicial proceedings for collection of such taxes and not to the summary proceedings by means of distraint.' It is significant that no reasons are stated to support the conclusion, and, furthermore, when the distraint warrant is referred to in the ruling it is called 'the summary proceeding,' yet the use of a distraint warrant is claimed not to be a 'proceeding.' "

The provisions of Sec. 250 (*d*) which require *determination* and *assessment* of the tax within the five year period, obviously relate to the functions of the Commissioner and impose restrictions upon his authority; while it is equally apparent that the provisions which enjoin any *suit* or *proceeding* for the collection of the tax after the prescribed period, relate to the functions of the Collector and are intended to impose restrictions upon his authority to collect taxes which have been assessed by the Commissioner, regardless of the method of collection adopted. The statute makes a clear distinction between the determination or assessment of the tax by the Commissioners on the one hand and on the other the collection of the tax so assessed by the Collector by "suit or proceeding." It is not the assessment prior to "the passage of this Act" which precludes the enforcement of the limitation, but the beginning of a "suit or proceeding for the collection" of the tax by the Collector.

Moreover, while we contend that the limitation imposed by Section 250 (*d*) applies whether or not there has been an assessment, we also take the position, already explained, that the assessment relied upon by the petitioners is illegal and void and that the situation is the same as though

no assessment had been made. If this contention is correct, it is immaterial whether or not distraint is contemplated by the word "proceeding", as neither assessment nor distraint would have been made within the five year period.

We submit, therefore, that the express language and obvious purpose of Section 250 (d), was to afford the honest taxpayer, after the expiration of the five years period, protection against the institution of any proceedings whatever, whether by distraint or otherwise, which have for their object the collection of a tax, and regardless of whether there had or had not been an assessment

We also submit that the foregoing argument demonstrates the correctness of our first principal proposition that a distraint by the petitioners for the purpose of collecting the additional income tax claimed to be due from respondent for the year 1915, would be without authority of law and in violation of express statutory inhibition.

Our second principal proposition, already stated, is as follows:—

B. Section 3224 of the Revised Statutes does not preclude the respondent from equitable relief.

Section 3224 R. S. is as follows:—

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

There is no occasion to review at length the cases in this Court discussing the right of injunctive relief against the assessment or collection of taxes. The latest decision of this Court as to the effect of Section 3224 R. S., is in the case of **Hill vs. Wallace, 259 U. S. 44**, in which this Court affirmed the action of the District Court in enjoining the collection of a federal tax and held as follows (p. 62):—

"A further question arises as to whether this is a suit for an injunction against the collection of the taxes in violation of Section 3224 Rev. Stats., in so

far as it seeks relief against the District Attorney and Collector of Internal Revenue. Were this a State act, injunction would certainly issue against such officers under the decisions in *Ex Parte Young*, 209 U. S. 123; *Ohio Tax Cases*, 232 U. S. 576, 587; *McFarland vs. American Sugar Refining Company*, 241 U. S. 79, 82. Does Section 3224 Rev. Stats. prevent the application of similar principles to a federal tax act? It has been held by this Court, in *Dodge vs. Brady*, 240 U. S. 122, 126, that Section 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable."

The "extraordinary and entirely exceptional circumstances" referred to in that case, consisted of the fact that failure to pay the tax would subject the taxpayer "to heavy penalties" and that recovery of the amount paid by the Board of Trade "would necessitate a multiplicity of suits and indeed, would be impracticable."

In the present case the "extraordinary and entirely exceptional circumstances" making Section 3224 R. S., inapplicable are as follows:—

1. The Commissioner had no jurisdiction to make the assessment relied upon and the assessment was, in consequence void.

2. Section 3224 R. S., when construed in connection with Section E of the Revenue Act of 1913 and with Section 250 (d) of the Revenue Act of 1921, does not forbid equitable relief under circumstances such as exist in the present case.

3. Unless the respondent is afforded equitable relief, he will be without legal remedy or such remedy would be inadequate.

We will consider these contentions in their respective order:—

B-1. The Commissioner had no jurisdiction to make the assessment relied upon and the assessment was, in consequence, void.

We have already shown that the Commissioner had no jurisdiction to make the assessment relied upon by the petitioners and that the assessment was, therefore, void. The following cases show that under such circumstances Section 3224 has no application:

In *Ledbetter vs. Bailey, Collector of Internal Revenue*, 274 Fed. 375, 380, 381 (District Court W. D. North Carolina, July, 1921), it was stated as follows:—

“This” (Sec. 3224) “is a statute having in view the orderly and uninterrupted collection of the revenues of the Government, which are necessary to meet its current expenses and public obligations. But in order to make this statute applicable, a tax which is to be collected must be lawful, it must be founded upon some proper subject of taxation, must be assessed in a proper way, and collected in a legal manner.”

In *Polk vs. Page, Collector of Internal Revenue*, 276 Fed. 128, 133, 134, it was held by the District Court of Rhode Island as follows:—

“Dodge *vs.* Osborn recognizes that there may be exceptional cases to which the provisions of section 3224 are inapplicable. * * *

“It may be said that plaintiffs seek only protection against action which is not a collection of a tax in the sense of the statute (section 3224) but, on the contrary, a violation of a statute (section 408). * * *

“We may look into the statute sufficiently to determine whether the act complained of is “the collection of a tax” or a merely illegal and unauthorized act of a person without statutory authority. * * *

"The question of the power of a collector to distrain before the time fixed by the statute from which his power is derived is a judicial question. Acting without statutory authority, the distraint would be merely an unlawful seizure of property. * * *

"The plaintiffs, in my opinion, make a case justifying the interposition of a court of equity, in order to prevent irreparable injury from an unlawful act. Furthermore, I am of the opinion that section 3224, R. S., does not forbid an injunction against a ministerial officer proceeding without authority and in violation of the controlling statute, since by the term 'collection of a tax' is meant a proceeding in accordance with law, and not a merely unlawful and unauthorized act."

While the conclusion reached by the District Court in the above case was reversed by the Circuit Court of Appeals (Page *vs.* Polk, 281 Fed 74, C. C. A. 1st Cir.) the decision of the appellate court was based upon the proposition that the plaintiff had an adequate remedy at law and that the Court below was, therefore "without authority to grant the injunction irrespective of the inhibition contained in Sec. 3224 of the Revised Statutes." (See also *Nichols vs. Gaston*, 281 Fed. 67, 70, C. C. A. 1st Cir.)

In *Frayser vs. Russell*, Fed. Cas. No. 5067 (Circuit Ct. Va. 1878), in restraining the collection of an additional assessment of 4 cents per pound on tobacco, it was held that:—

"The course for the collector to pursue, even if this latter four cents had been a proper demand as a tax, was marked out to him by Section 3371 of the Revised Statutes of the United States. The collector did not take the course directed by law in a case where 'the proper stamps' had not been used, and the proper tax had been 'omitted to be paid.' His threatened levy was for what was not a tax; and it was threatened to

be made in a manner which set at naught the provisions of Section 3371. It was a clear case for the exercise of the restraining power of the court, and was not a case falling either within the letter, or spirit, or intention of Section 3224."

In *Ogden City vs. Armstrong*, 168 U. S. 224, it was held at pages 236, 237 and 240, as follows:—

"It is doubtless true that the collection of a tax will not be restrained on the ground that it is irregular or erroneous. Errors in the assessment do not render the tax void; and usually there are legal remedies for all such mere irregularities and errors as do not go to the foundation of the tax, and parties complaining must be confined to these. As was held by this court in *Dows vs. Chicago*, 11 Wall. 108: 'A suit in equity will not lie to restrain the collection of a tax on the sole ground that it is illegal. There must exist in addition special circumstances, bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant.'

"But the present case would seem plainly to be one of equitable jurisdiction within the doctrine of that case. What is complained of is no mere irregularity or error in the assessment. As we have seen, there was an entire want of jurisdiction in the Common Council to proceed for want of the assent of the requisite proportion of property owners, and the assessment and tax were, therefore, void. * * *

"Again, it is contended on behalf of the appellant, that the defendants cannot recover the taxes paid by them under protest because the Session Laws of Utah, 1890, Sec. 1, p. 38, provide that 'any party, feeling aggrieved by any such special tax or assessment, or pro-

ceeding, may pay said special tax assessed or levied upon his property, or such instalments thereof as may be due, at any time before the same shall be delinquent, under protest, and with notice in writing to the City Collector that he intends to sue to recover the same, which notice shall particularly state the alleged grievances and grounds thereof; whereupon such party shall have the right to bring a civil action within sixty days thereafter, and not later, to recover so much of the special tax as he shall show to be illegal, inequitable and unjust, the cost to follow the judgment, to be apportioned by the Court as may seem proper, which remedy shall be exclusive.

"As respects this contention we agree with the Supreme Court of the Territory, that this statute applies to cases where there are only errors, irregularities, overvaluations or other defects which are not jurisdictional, but that where the council, not having the jurisdiction to levy the tax, could not proceed under the statute, the taxpayers need not proceed under the statute to recover the money paid. Where the tax was wholly void and illegal, as in this case, the statute and its remedies for errors and irregularities have no application."

The foregoing cases show that Sec. 3224 R. S., is applicable when the injunctive relief prayed for is dependent upon mere errors or irregularities in the assessment which do not go to the foundation of the tax. In such cases it may be properly said that provided the assessment is made under color of their offices by proper government officials charged with general jurisdiction of the subject of assessing taxes, the taxpayer is remitted to his legal remedy if there be one. When, however, it is no mere error or irregularity in the assessment, which is complained of, but upon the contrary a complete want of jurisdiction in the Commissioner to make the assessment and the assessment is in consequence void, Sec. 3224 R. S., is not applicable.

It may be said of the federal tax system as it was said, in effect, in *Ogden City vs. Armstrong*, 168 U. S. 224, 240, *supra*, in reference to the laws of Utah, that the system prescribed by the United States with respect to the collection and refund of taxes, is intended to apply in all cases where the tax is properly assessed and collected, or where there is a mere irregularity or error in the assessment or collection which does not go to the foundation of the tax. But that where the assessment and, in consequence, the tax is wholly void and illegal, the statutes and their remedies for errors and irregularities have no application.

Our second contention in support of our second principal proposition is as follows:—

B-2. Sec. 3224 R. S., when construed in connection with Sec. E of the Revenue Act of 1913 and with Sec. 250 (d) of the Revenue Act of 1921, does not forbid equitable relief under circumstances such as exist in the present case.

As already shown, Sec. E of the Income Tax Act of 1913, authorizes assessment, in the case of "false" returns, within three years after the return was due. While Sec. 250 (d) of the Revenue Act of 1921, expressly prohibits "*any suit or proceeding for the collection*" of the tax after five years from the date the return was filed.

The statutory provisions referred to were enacted for the purpose of protecting the taxpayers against assessment and against any summary proceeding instituted to collect the tax, after the three and five years periods had elapsed. Can the petitioners successfully maintain that it was the intention of Congress that the taxpayer should be without any means of availing himself of this protection in case the Government officials chose to disregard the statutory limits imposed upon their authority?

Unless the respondent is entitled to equitable relief, he can in no way obtain the protection intended to be afforded him by Congress and the statutory limitations imposed

upon the authority of the Commissioner and Collector would be meaningless. Unless the Court may exercise its restraining influence in such a case as the present, there would be, in effect, no limitation upon the period during which an assessment or distraint might be made.

Such a result, so manifestly opposed to the intention of Congress, may be avoided by reading Section 3224, of the Revised Statutes and the Revenue Acts of 1913 and 1921, together and in the light of the authorities already cited.

When so construed, Section 3224 applies when the complaint is of some mere error or irregularity in the proceeding or an improper exercise of discretion upon the part of a government official, but does not forbid relief when the threatened distraint is not only based upon a void assessment but is also expressly forbidden by statute.

Revised Statutes Section 3224 provided that no injunction shall issue to restrain the assessment or collection of any tax, and by a later statute (Act of 1921) it is provided that no suit or proceeding shall be begun for the collection of any taxes after the expiration of five years after the date when the return was filed. It would seem obvious that the only way to enforce the provisions of the Act of 1921 would be by injunction if the Collector undertook to violate its provisions, and therefore Section 3224 and the Act of 1921, should be read together and in a case where the limitation bars the officer's right to proceed, it should be held that the provisions of the Act of 1921 supercede Section 3224.

The third contention in support of our second principal proposition, is as follows:—

B-3. Unless the respondent is afforded equitable relief, he will be without legal remedy or such remedy would be inadequate.

In ordinary cases of error or irregularity in assessment or collection, the tax system prescribed by Congress affords the taxpayer an adequate remedy. In such cases Sec.

3224 R. S. has been applied as a bar to equitable relief upon the theory that the taxpayers' remedy by claim for refund and suit was full and adequate or so regarded by the Court.

No Court, however, has denied and many have affirmed the proposition, that there may be exceptional cases where the system prescribed by Congress relating to claim for refund and suit, would afford the taxpayer either no legal remedy or one wholly inadequate, and that in such cases the taxpayer is entitled to equitable relief. (See *Hill vs. Wallace*, 259 U. S. 44, *supra*, p. 28.)

Unless equitable relief is afforded the respondent in the present case, he will either be without legal remedy or such remedy will be inadequate for the following reasons:—

(a) The right given to the respondent by Sec. E of the Revenue Act of 1913 to be protected against assessment after the expiration of the three year period and the right given him by Sec. 250 (d) of the Revenue Act of 1921, to hold his property free from seizure and distraint after five years from the date when his return was filed, cannot be enforced in a court of law.

(b) There is no statutory provision under which the respondent may file a claim for refund, which is a condition precedent to the institution of suit.

(c) Assuming, for argument's sake, that a legal remedy would be available to the respondent, it would be inadequate to compensate him for the loss of his freehold.

With respect to the first reason:—

Sec. 250 (d) of the Revenue Act of 1921 as already shown, provides that:—

"No suit or proceeding for the collection of any such taxes due under this act or under prior income, excess-profits, or war-profits tax acts, * * * shall be begun, after the expiration of five years after the date when such return was filed."

These provisions like any other statute of limitations, relate to *remedy* as distinguished from *right*. They, in effect, declare that although a tax may have been properly assessed and due and owing, yet the government is barred from collecting that tax after the prescribed period.

The statutory provisions in question confer upon the taxpayer a substantial right, the right to hold his property free from seizure and distraint after the five year period, and the only way in which the respondent may enforce this right and obtain the protection intended to be afforded him by Section 250 (d), is by asserting the provisions of that Section as a bar to the collection of the tax.

Moreover it would appear that the only right given to the taxpayer by that Section, is the right to oppose the collection of the tax after the five year period, and that if this right cannot be successfully asserted as a bar to collection, it becomes ineffective for any purpose whatever, for it is at least extremely doubtful whether such right as is given by Section 250 (d) could be made the basis of a suit by a taxpayer to recover the amount of a tax which has been collected. In such a suit the government would contend that its *right* to the tax was not impaired by Section 250 (d), and that that section relates solely to remedy and gave the taxpayer merely a personal defense which he had been unable to successfully interpose to the collection of the tax.

In any suit which may be brought by the Collector, the right given to the respondent by Section 250 (d) may be asserted as a defense. As against the threatened distraint proceedings, however, the only way in which respondent may interpose the right or defense afforded by Section 250 (d) is by a proceeding in equity.

Unless, therefore, the respondent is granted equitable relief, the provisions of Section 250 (d) prohibiting distraint after the five year period has expired, may be completely nullified at the option of the Collector, and the respondent will not only be unable to hold his property free from distraint or seizure as contemplated by the

statute, but in all probability will be precluded from any relief whatsoever based upon the provisions of that section.

That equity will ordinarily take jurisdiction and afford relief under such circumstances, is a matter of elementary law.

"Equity will not suffer a wrong to be without a remedy. This maxim includes the whole theory of equity jurisdiction, that it affords relief wherever a right exists and no adequate remedy at law is available, subject to the rules already stated in respect to the scope and limits of equity jurisdiction. It is the application to equity of the broader legal maxim: *ubi jus ibi remedium*. In accordance with the maxim, where a statute creates a new right which cannot be adequately enforced at law, equity will contrive remedies and orders to enforce it, unless the statutory remedy is exclusive as determined by the usual rules. The fact that there has been no precedent will not deter a court of equity from awarding relief in a proper case."

21 C. J. 198.

A like argument applies to the enforcement of the right given respondent by Sec. E of the Revenue Act of 1913 to be protected against assessment after the three year limitation.

(b) There is no statutory provision under which the respondent may file a claim for refund, which is a condition precedent to the institution of suit.

Sec. 3226 R. S., as amended by the Revenue Act of 1921, provides that no suit or proceeding shall be maintained for the recovery of any tax, "until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, *according to the provisions of law in that regard*, and the regulations of the Secretary of the Treasury established in pursuance thereof." (Italics ours.)

Sec. 3228 R. S., as amended by the Revenue Act of 1921, is the only statute under which a claim for refund may be filed which will afford a basis for a suit and this Section does not apply to a claim for refund of taxes paid under the Revenue Act of 1913. Section 3228, as amended is as follows:—

“Sec. 3228. All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum.

“This section, except as modified by section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918.”

The Treasury Department shortly after the passage of the Act of 1921 considered the question of “authority for refund” under that Act, and with reference to the amendment of Section 3228. The ruling of the Commission will be found in Cumulative Bulletin I-1, January-June 1922, at page 312, as follows:—

“It will be observed that this amendment served to extend the time within which claims for refund may be filed to four years and this provision is made retroactive in so far as it relates to claims for refund filed under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918. At the time of the passage of the 1921 Act more than four years had elapsed since the date of the payment of both the original and the additional tax, and as these payments were for a tax under the 1913 Act, and as Section 3228, Re-

vised Statutes, is not made retroactive as to claims for refund under the 1913 Act, it follows that no relief is open to the taxpayer from this source."

It appears, therefore, that prior to the institution of the present suit, the ruling of the Commissioner was in accordance with the construction contended for by respondent, to wit: that Section 3228 was not made retroactive as to claims for refund under the Act of 1913, but was limited to the Acts of 1916, 1917 and 1918.

Petitioners themselves contend that the claim for refund which may be filed under Sec. 252 of the Revenue Act of 1921, as amended by the Act of March 4th, 1923, does not afford the basis for a suit but merely authorizes the Commissioner to refund at his discretion. Thus in their supplemental brief filed in the Circuit Court of Appeals petitioners state: "As a matter of fact, Section 252 has nothing to do with *when* claims for refund *must* be filed for the purposes of Sections 3220 and 3228 of the Revised Statutes, as amended, and such is the published decision of the Commissioner. (T. D. 3416, *supra*.)"

It appears, therefore, that respondent will be unable to file a claim for refund "according to the provisions of law in that regard," in case the petitioners are permitted to collect the amount of the tax claimed, and without such claims for refund respondent would have no remedy at law.

"Men must turn square corners when they deal with the government. If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with."

Rock Island etc., R. R. vs. United States, 254 U. S. 141, 143.

If this be applicable, in requiring the strict compliance with the statute by persons who seek a remedy against the Government, it must be equally applicable in requiring

a clear remedy at law to be shown by existing statute, if on that ground persons are to be deprived of the benefit of protection by a Court of Equity.

(c) Assuming, for argument's sake, that a legal remedy would be available to the respondent, it would be inadequate to compensate him for the loss of his freehold.

In paragraph 18 of the Bill it is alleged that (Rec. p. 8):—

"18. Complainant charges that the Collector of Internal Revenue for the District of Delaware intends to proceed by distraint or otherwise to collect from complainant the \$1,576,015.86 referred to in the notice and demand of December 31, 1919, and that the said Collector will proceed to collect the same by distress and sale of complainant's lands and freehold in the District of Delaware, and that said demand on the part of the Commissioner of Internal Revenue constitutes a cloud upon the lands and freehold of complainant situate in Brandywine Hundred, New Castle County, Delaware; and that if the Commissioner proceeds to collect said demand by distress and sale of complainant's lands and freehold that the loss of his said freehold by means of a tax sale would be an irreparable damage to complainant. That by reason of the long delay on the part of the Commissioner of Internal Revenue, the 75,534 shares of common stock of the Delaware Company received by complainant on October 1, 1915, and now held by complainant are not salable, that no market can at present be found for said stock, and that complainant will be unable by the use of said stock to secure the money to prevent the sale of his freehold estate upon such distraint."

In *Ogden City vs. Armstrong*, 168 U. S. 224, 239, it was stated as follows:—

"In *Union Pacific Railway vs. Cheyenne*, 113 U. S. 516, 525, this court, through Mr. Justice Bradley, said:

"'But it is contended that the complainant should have sought a remedy at law and not in equity. It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage or be subjected to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which a sale could be made would be a grievance which would entitle him to go into a court of equity for relief.' Numerous cases to the same effect may be found cited in *Cooley on Taxation*, 543."

Upon the foregoing argument it is submitted that Section 3224, R. S., does not preclude the respondent from equitable relief.

We have shown not only that the respondent either has no legal remedy or that such remedy is doubtful and inadequate, but also that the assessment is void and the threatened distraint would be in violation of express statutory inhibition.

We submit, therefore, that the present case falls within the category of extraordinary and exceptional cases which have been held by this Court not to be within the inhibition of Section 3224 R. S.

CONCLUSION.

The only case cited by petitioners in their argument before the Circuit Court of Appeals which requires special comment, is that of *Snyder vs. Marks*, 109 U. S. 189.

Petitioners stated that this case "completely disposes of complainant's claim to equitable relief in the case at bar on all the grounds stated in his bill of complaint."

Petitioners, however, failed to distinguish between mere conclusions of law and averments of facts in support thereof.

Thus, in the *Snyder-Marks* case, while it is true that complainant alleged, first, that the assessment was void, because it did not show upon what it was based, nor upon what the taxes were alleged to be due, second, that the assessment was made more than fifteen months after the time which it embraced elapsed, and, third, that complainant was without adequate remedy, the *facts* showed no basis for any of these conclusions.

No facts whatever appear to have been averred in support of the third of these propositions. With respect to the first the Court held that the facts showed that the assessment was sufficiently certain. The second proposition was not even discussed because the only limitation upon the right of the Commissioner to make the assessment was contained in Section 3182 of the Revised Statutes, and that limitation was as follows:—

"* * * the Commissioner of Internal Revenue may, at any time within fifteen months *from the time of the delivery of the list to the collector* as aforesaid, enter on any monthly or special list the name," etc.

It is obvious that this limitation lent no support to the allegation in the *Snyder-Marks* case that the assessment was void because it was made "more than fifteen months *after the time which it embraced had elapsed.*"

It is submitted, therefore, that there is not the slightest similarity between the *facts* in the Snyder-Marks case and those in the present case. Moreover in the Snyder-Marks case, this Court held that Section 3224 forbids injunctive relief only when the tax claimed "*is in a condition to be collected as a tax,*" and that "the list shows a tax which the appellant might be liable to pay, and one which the commissioner had general jurisdiction to assess against him," (109 U. S. at 192, 193), whereas in this case the claim is for a *tax which the collector is expressly forbidden to attempt to collect by any "suit or proceeding."*

In discussing the technical legal points of the present case, one is apt to lose sight of the substantive merits of the respective positions of the parties.

The facts show that the alleged return known as Exhibit 6 is not in proper form, nor made by the proper official; it was not made within three years from March 1, 1916; the alleged assessment relied upon was not even based upon the alleged return, and was likewise made after the three years period, and the tax claimed is based on a valuation of the stock far in excess of its real value.

In addition to this, we have the Act of 1921, expressly forbidding the collector from proceeding either by distraint or suit to collect any tax after five years from the date when the return was filed.

Regardless of these facts, we have the spectacle of a United States Government official insisting that although his threatened actions are in express violation of statutory inhibition, they cannot be enjoined because of a technical construction of Section 3224 of the Revised Statutes. According to his contention, he must, therefore, be permitted to collect the tax by distraint, although Congress has declared that he shall not, and respondent must be left to discover by long and tedious legal process whether or not there is any legal remedy by which he may obtain any redress for a wrong committed in violation of express statutory inhibition.

It is respectfully submitted that Congress has not intended to so restrict the jurisdiction of the Federal Courts that they are impotent to prevent the wrong threatened in this case.

Respectfully submitted,

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HENRY P. BROWN,

Counsel for Respondent.

APRIL 19TH, 1923.